

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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JOHN DIEKMAN

Plaintiff

v.

ENERGY CHOICE MARKETING,

INC., ET AL.

Defendants

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CIVIL ACTION NO. 02-4681

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION  
TO STRIKE THE AMENDED COMPLAINT

Defendants Consumer Choice, Inc. (formerly known as Energy Choice Marketing, Inc.) ("CCI"), S&D Marketing, Inc. ("S&D") and Shai Fishman ("Fishman"), through their counsel Burns & Kamen, submit this Supplemental Memorandum of Law in support of Defendants' Motion to Strike the Amended Complaint. Plaintiff John Diekman ("Diekman") in his Reply to the Motion to Strike argues that because only CCI filed an answer, he may still amend the complaint as of right as to S&D and Fishman because they filed a 12(b)(6) motion to dismiss which is not deemed a responsive pleading.

If S&D and Fishman were parties unrelated to CCI and if the claims against them were separate, Defendant's argument would have some merit. However, the argument is not persuasive because the claims against S&D and Fishman are derivative of the claims to which an answer was filed by CCI. In fact, the Complaint alleges in paragraph 5 that S&D "at all relevant times acted as the alter ego or parent or managing agent of [CCI]. The claims against Fishman are based on his position as an officer and director of CCI and arise from the alleged breach of

the employment agreement between CCI and Diekman. Accordingly, because CCI has filed a responsive pleading denying the material allegations, for purposes of filing an amended complaint against the related corporate entities and officer, Plaintiff should have sought leave of Court. The Motion to Strike should therefore be granted.

Respectfully submitted,

Date: January 7, 2003

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Attorney for Defendants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Memorandum of Law in Support of Defendants' Motion to Strike the Amended Complaint was sent by first-class mail, postage prepaid to the following on the 7<sup>th</sup> day of December 2002

Michael McDonnell, Esquire  
Ryan Brown McDonnell Berger and Gibbons  
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Stephen G. Burns